Supreme Court, U.S.
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No. 93-1101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ANN BRUNET and DENISE SACHS,
on behalf of themselves and the class they represent,
Petitioners,

v.

GUY E. TUCKER, JAMES T. MEYER,
STUART J. TUDOR, and JOSEPH S. HILLEARY,
on behalf of themselves and the class they represent,

and

CITY OF COLUMBUS, OHIO, COLUMBUS
CIVIL SERVICE COMMISSION, DANA RINEHART,
ALPHONSE MONTGOMERY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF GUY E. TUCKER, et al.

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STATEMENT OF FACTS

Disregarding the facts as found in both lower courts, Petitioners assign a discriminatory motive and effect to virtually every decision on hiring within the Columbus Division of Fire over the last twenty years. The purported evidence of discrimination lacks support in the Record; indeed most such assertions were squarely rejected by the District Court. Petitioners' Statement of Facts omits key dispositive facts expressly relied upon by the lower courts.

- There is no direct evidence of any intentional discrimination against female applicants since Title VII was made applicable to municipalities. (1 F.3d at 406, 409; App. 63-64, 77.)
- No evidence of current discrimination exists. (1 F.3d at 409; App. 77-78.)
- The District Court held in 1986, after a trial on the merits, that Petitioners had failed to establish intentional discrimination. (1 F.3d at 405; App. 61.)
- The District Court held in 1992, after a trial on the merits, that there was no evidence of a pattern or practice of discrimination against women. (1 F.3d at 406; App. 66.)
- The singular past discrimination resulting from the disparate impact of testing procedures in 1984 affected a total of four female applicants, and it was fully remedied. A new test was validated, and the few affected applicants appointed to posi-

tions with the Fire Division. (1 F.3d at 395, 409; App. 16, 79-80.)

- The City of Columbus disregarded its own expert's new test in agreeing to the consent decree, and in using it as an excuse to intentionally hire less-qualified applicants solely because they were women. (1 F.3d at 407, 409-11; App. 68, 78-86.)
- Any gender discrimination in hiring which occurred prior to the effective date of Title VII, eighteen years ago, was too remote to support the consent decree, especially in light of aggressive affirmative efforts by the City to recruit female firefighter applicants starting in the mid-1970's. (1 F.3d at 405, 409; App. 61, 76.)
- The statistical disparity, if any, between qualified females and existing female firefighters was the consequence of job-related methods of selecting the most qualified applicants. (1 F.3d at 407; App. 69-70.)
- In order to remedy harm sustained by the male Respondents, very modest remedial relief was granted adjusting the relative seniority among Respondents and Petitioners. (1 F.3d at 413; App. 93-94.)

ARGUMENT

This case involves little more that the application to a unique set of facts of the precedents which have evolved in this Court's jurisprudence examining classifications challenged under the Equal Protection

Clause, and the authority of federal courts to modify injunctive orders entered in earlier litigation. Although left unaddressed in Petitioners' Questions Presented, the alternative ground for the decision below is derived from this Court's recent opinion in *Rufo v. Inmates of Suffolk Co. Jail*, ___ U.S. ___, 112 S. Ct. 748 (1992). Five[1] different federal judges have found that the gender-based preference implemented in February, 1989 as one part of a consent decree, which ignored the City's new civil service examination in favor of a quota with a minimum duration of 20 years, was wholly unjustified as a remedy for past discrimination. The decree was properly modified upon the challenge filed by these Respondents, Guy E. Tucker, et al.

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[1] Senior District Judge Joseph P. Kinneary heard both the original *Brunet* case and the earlier *Dozier* case referenced in the Petition, which involved racial discrimination issues. In February, 1989, at the request of Petitioners and the City, the Court entered the consent decree in *Brunet I* containing the challenged gender-based hiring arrangement. App. 159. By July 1991, however, Judge Kinneary agreed at least preliminarily that his 1989 Order was probably constitutionally infirm. Thus, the Court entered several well considered Orders, after notice, early in the *Tucker* suit putting a halt to further use of the *Brunet I* quota for the next fire class scheduled to begin in mid-August, 1991. After Judge Kinneary's Orders were "stayed" by a single Circuit Judge, however, counsel for the Brunet plaintiffs filed a Motion to Disqualify Judge Kinneary. While denying the Motion in a lengthy Opinion filed August 22, 1991 which reviewed at length the proceedings before him, Judge Kinneary held the Motion to Disqualify filed by Petitioners violated Rule 11, FRCP. That Order was not included in Petitioners' Appendix. Judge Kinneary nevertheless recused himself to avoid any possible criticism of the Court, resulting in reassignment to District Judge James L. Graham who conducted further proceedings. 1 F.3d at 398; App. 31, note 6.

As framed, the Questions Presented are inexplicably bound up in the details of the vast factual Record. Evidence was accumulated through two different *Brunet* lawsuits and, indirectly, through other discrimination litigation involving the Fire Division dating back into the 1970's. *See Dozier v. Chupka,* 395 F. Supp. 836 (S.D. Ohio 1975), *injunction dissolved,* 763 F. Supp. 1430 (S.D. Ohio 1991). The fact-specific nature of the inquiry in this case is evidenced by lengthy decisions of both the trial judges and of the Court of Appeals. No novel issue of constitutional law is presented. Further review in this Court is not appropriate for the gender-based preference at issue in this litigation premised upon nothing more than ill-conceived paternalistic stereotyping.

I.

Petitioners first contend that this case deserves review because the United States Court of Appeals for the Sixth Circuit applied "strict scrutiny" analysis in this case, and in previous gender discrimination cases under the Fourteenth Amendment, while the Ninth Circuit does not. This is not a question upon which this Court should grant the Writ.

Undeniably the Sixth Circuit references the "strict scrutiny" doctrine in its decision. It is equally clear that it also reviewed all of the applicable precedents from this Court which expressly recognized that "searching judicial inquiry" and "close examination of legislative purpose" are appropriate when reviewing "classifications based either on race or gender." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989). Given the factual Record in this case, the same outcome would have been reached using any

formulation of "strict," "searching," "close," "heightened," or "intermediate" scrutiny.[2] Under any such scrutiny the question presented, first and foremost, is whether there existed identifiable, actionable discrimination sufficient to justify an otherwise impermissible classification. *See Coral Construction Co. v. King County*, 941 F.2d 910, 931-32 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 875 (1992); *Contractors Ass'n of Eastern Penn., Inc. v. Philadelphia*, 735 F. Supp. 1274, 1304 (E.D. Pa. 1990), *vacated on other grounds*, 945 F.2d 1260 (3d Cir. 1991), *subsequent opinion*, 6 F.3d 1990 (3d Cir. 1993). The Sixth Circuit's pre-*Croson* decision in *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), embraced this premise as well. There the Court found a female preference unconstitutional because the government had nothing to justify it except generalized assertions of past discrimination. In light of the *Croson* decision and other applicable precedents from this Court, one may not justify a gender-based preference using group stereotyping. Any preference must be premised upon continuing or past discrimination left unremedied. This principle is supported not only by the Sixth Circuit's decision here and in *Michigan Road Builders*, but also in the Ninth Circuit's *Coral* decision, which is relied upon by Petitioners. There is, thus, no Circuit split on this fundamental point.

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[2] Indeed, a good faith argument from this Record can be made that the consent decree fails the less demanding "rational basis" analysis. It defied rationality to jettison Dr. Landy's thoughtfully developed test and his other work under the circumstances which existed in February, 1989, and go instead to a 20-year quota. *See Craig v. Boren*, 429 U.S. 190, 215 (1976) (Stewart, J., concurring); *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993).

Petitioners utterly failed to make even a minimal factual showing of the genuine need for continued gender-specific "remedial" action in this instance. They offered no factual showing when the consent decree was originally adopted in 1989. They made no such showing after these Respondents brought suit in 1991. The District Court's factual findings foreclose Petitioners on that point, particularly when the Court of Appeals in this case went so far as to reexamine factual findings derived from the Record in *Brunet I* (which had been previously closed by Petitioners' voluntary dismissal of their first appeal).

After an examination of the old *Brunet I* Record, the Court of Appeals rejected Petitioners' arguments that those District Court findings could be overturned and thereby justify this quota. Thus the Court of Appeals affirmed the trial court's factual finding "that the City did not intentionally discriminate against women in the hiring of firefighters." 1 F.3d. at 405-06; App. 63-64; *see also* 642 F. Supp. at 1236. The District Court further found that there was "no evidence . . . which would justify a finding of a pattern or practice of discrimination against women." 1 F.3d at 406; App. 66. The Court of Appeals correctly recognized that in reaching such conclusions the District Court in *Brunet II* had not simply relied upon the earlier *Brunet I* decision. 1 F.3d at 406; App. 66. In short, Petitioners defend a consent decree never genuinely needed or intended to remedy discrimination.

Because there is no Circuit split on the controlling legal proposition that there must be meaningful evidence of past discrimination to justify any "remedy" like the 20-year quota set up in the 1989 consent decree, Petitioners failed. Rather than serving as a

remedy, the consent decree, as found by both the District Court and the Court of Appeals, actually constituted "intentional discrimination" against male firefighter applicants. The City had the obligation of protecting the rights of each *individual* applicant, male or female, consistent with the obligation imposed by the Fourteenth Amendment since at least *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). The City of Columbus disregarded individual test scores when it consented to the decree in early 1989, which disregarded the City's own brand-new civil service test. The test had been carefully constructed by Dr. Landy, a nationally known expert in industrial psychology. App. 115, 120-22, 146. Instead of using its test to protect all individuals, male and female, the District Court found the City "apparently decided to settle the [*Brunet I*] case to avoid additional litigation expense." App. 134. Simultaneously Dr. Landy's detailed Report on the validity of the new PCT was quietly "withdrawn," without any explanation, from the consideration of the District Court. It had been in the *Brunet I* file awaiting the Court's review, and presumably approval, between August 3, 1987 and February 27, 1989. App. 131, 162, consent decree para. 10.

The statistics-based arguments advanced by Petitioners[3] were carefully reviewed in the Court of Appeals. It affirmed the trial judge's conclusion that

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[3] In considering them, the observation of one federal trial judge seems apt:

> It has been said, statistics are like a lamp post to a drunk—they provide support but furnish very little illumination.

E.E.O.C. v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1383 (W.D.N.C. 1991).

disparities alone in hiring between men and women for the difficult job of firefighter simply were not of much value. "[T]he same reason for the small percentage of women on the fire force today explains why there were so few women on the force in 1986—the PCT has [a permissible] adverse impact on women." 1 F.3d at 407; App. 70. Other evidence was also reviewed by the District Court and the Court of Appeals to determine if there was "a 'strong basis in evidence' to support the consent decree at issue." 1 F.3d at 408; App. 75. There was not. Failure to make this threshold showing was dispositive, and was unrelated to the precise label assigned to the level of Equal Protection scrutiny.

This does not end the inquiry. Under this Court's recent decision in *Rufo v. Inmates of Suffolk County Jail*, ___ U.S. ___, 112 S. Ct. 748 (1992), a District Court retains significant discretion to reexamine injunctive orders. The trial court recognized and exercised that authority. App. 126, 134-135, 143. This Court's precedents on the more flexible standard of modification of consent decrees or injunctions in public or institutional reform cases were appropriately applied, in the discretion of the District Court, given the factual Record in this case. *See also Patterson v. Newspaper & Mail Deliverers' Union*, ___ F.3d ___, 1993 U.S. App. LEXIS 33407 (2d Cir. Dec. 20, 1993). Although this is an essential element of this litigation, Petitioners fail to address the exercise of the District Court's discretion under *Rufo* in any of the Questions Presented.

II.

The second Question Presented by Petitioners is that the factual Record was sufficient to support a

"gender conscious consent decree." With few citations to the Opinions of either the District Court or the Court of Appeals, Petitioners simply seek to rewrite the facts as found below.

Little discussion is justified on this Question other than, perhaps, to address one key factual conclusion underlying Petitioners' argument. They argue that at the date of the consent decree in February, 1989, "ranking on the firefighter test was discriminatory." Petition at 23; and at 15, note 7. This is a misleading use of the factual Record, attempted in the lower courts but wisely rejected. No one, except counsel for the Petitioners, has ever said that "in February, 1989, when the consent decree was filed, ranking on the firefighter test discriminated against women." Petition at 15, note 7. The true situation was that in February, 1989, the District Court *had not yet judicially approved* use of the City's *new* firefighter test *for rank order hiring* based on individual test scores. However the lack of judicial approval—which was given by Judge Graham in 1992 based largely upon evidence available in 1987—is not equivalent to "discrimination."

In February, 1989, the professional study of the entry-level test needed to gain judicial approval was sitting in the District Court's file, having been filed in *Brunet I* as soon as it was completed by Dr. Landy in August, 1987. 1 F.3d at 395; App. 17. As the Court of Appeals recognized, "[b]ased on this [Landy] study, the District Court determined in its memorandum opinion of July 24, 1992, that a higher score on the PCT is likely to result in better job performance, and that therefore the test results could be used to select new firefighters in order of their PCT scores." 1 F.3d

at 396; App. 20. Thus, using evidence from the August, 1987 study the trial court "modified its May 21, 1987 preliminary order to allow the City to hire firefighters in strict rank order from a single list comprised of males and females." *Id.* Not one female applicant was being "injured" or discriminated against in 1989 simply because final judicial approval of rank order hiring had not yet been obtained. After all, the entire firefighter selection process since 1986 was done under District Court supervision!

Nowhere is there any evidence to support Petitioners' twisted view that "ranking on the firefighter test discriminated against women" when, in February, 1989, the consent decree was imposed. The most that can be said is that the District Court had not held a hearing and announced a conclusion on the use of Dr. Landy's new test to rank order the candidates by their scores; yet the same written Report and testimony by Dr. Landy produced exactly that result in 1992. Of course, the Petitioners then go on to contend that the "validity of ranking is irrelevant to whether or not the consent decree is constitutional," but this further demonstrates the weakness of their contradictory positions. Petitioners rewrite history to argue that the 1987 Landy study, done in sufficient depth and detail to be filed at the District Court, was merely illusory. They ignore the 1992 holding of the District Court that the Landy Report was very thorough, mischaracterizing it as merely "an after-the fact finding that ranking is valid." Petition at 23. Such manipulated analysis of the factual Record furnishes no reason to grant the Writ.

III.

The third Question raised by the Petitioners concerns Respondents' standing to sue and is similarly fact driven.[4] The consent decree was solely the product of private negotiations between the City and Petitioners. The District Court entered the consent decree without any formalities such as notice, factual findings, or a public hearing. App. 132. Instead, it was quietly adopted "without any consideration to the impact of the consent decree on the rights of male firefighter applicants." App. 134. In the wake of this Court's decision in *Martin v. Wilks*, 490 U.S. 755 (1989), Respondents filed both a Rule 60(b) Motion in *Brunet* I and a new lawsuit seeking modification of the consent decree. The District Court rejected the City's efforts to buy-off the claims of the named plaintiffs and found standing appropriate for all of them under, among other cases, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).[5]

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[4] Petitioners' placement of the standing issue last, which under Article III of the United States Constitution is very nearly the first issue in any case, is perhaps a self-indictment of the merit of this Question.

[5] Respondents reserve the opportunity to brief the standing grounds set forth by the District Court if Certiorari is granted. Additional trial court opinions not included in Petitioners' Appendix deserve review to fully understand the complex events which occurred once Guy Tucker and others announced their challenge. Likewise, Respondents would further argue an appropriate construction of this Court's recent Opinion in *Northeastern Florida Contractors v. Jacksonville*, ___ U.S. ___, 113 S. Ct. 2297 (1993), furnishes these Respondents' standing. *Jacksonville* is mentioned in passing by the Court of Appeals. 1 F.3d at 397; App. 24-25. However, it was announced only after oral argument in this case had occurred.

The Sixth Circuit concluded that, in any event, three out of four of the individual Respondents had standing because of a diminution in their relative seniority rights which arose to the extent that less-qualified female applicants had been hired before better qualified males. 1 F.3d at 401; App. 44-45. It is clear "[t]he women hired in the August, 1991 class achieved a higher place on the CDF's seniority hierarchy than they would have in the absence of the consent decree. [Petitioners' class members] Fox and Sachs would be less senior than [Respondents' class members including] Tudor, Meyer, and Hilleary if not for the consent decree." *Id.* Respondents' injury arose from having to compete under the Fire Division seniority system for tangible benefits such as vacation and promotions with Fox and Sachs who, because of their lower test scores, should not have occupied equivalent seniority positions with Respondents. The female firefighters achieved higher job seniority only by operation of the consent decree. The significance of such an injury results from the importance placed on seniority rights under the Fire Division collective bargaining agreement. *Id.* Thus, harm was clearly particularized and both conferred standing to sue and justified the remedial relief ultimately awarded Respondents.

Hoping to dress up this wholly factual inquiry with a legal twist, Petitioners suggest that this standing theory is somehow an expansion of the case law. The Sixth Circuit did not, however, announce any new theory of standing. Its opinion was only the direct application of *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), which recognized the importance of individual seniority rights in many American workplaces.

Petitioners also overlook, again, that resolution of this standing issue in their favor still does not foreclose the District Court's modification of the consent decree under *Rufo v. Inmates of Suffolk Co. Jail*, ___ U.S. ___, 112 S. Ct. 748 (1992). Thus, denial of standing for these Respondents would be a hollow achievement inasmuch as the same outcome is reached in the District Court's discretionary modification of the consent decree.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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